

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

GERINO LUNA-GARCIA,

Defendant/Petitioner.

NO. CR-02-6017-EFS

**ORDER DENYING DEFENDANT'S POST
CONVICTION MOTION PRO SE UNDER
APPRENDI'S LAW TO DISMISS WITH
SUPPORTING MEMORANDUM OF LAW**

Before the Court, without oral argument, is Gerino Luna-Garcia's Post Conviction Motion Pro Se Under Apprendi's Law to Dismiss with Supporting Memorandum of Law, ECF No. [122](#). Mr. Luna-Garcia's motion challenges the constitutionality of the Indictment, ECF No. 1, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). He asks the Court to dismiss the Indictment as a violation of the Fifth and Sixth Amendments to the U.S. Constitution. Mr. Luna-Garcia's motion appears to be a habeas petition under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Accordingly, the statute Mr. Luna-Garcia may rely upon to bring such an action is 28 U.S.C. § 2255. See *Bogovich v. Sandoval*, 189 F.3d 999, 1002 (9th Cir. 2005).

However, Mr. Luna-Garcia's motion neither cites to § 2255 nor complies with the requirements of the Rules Governing Section 2255 Proceedings for the United States District Courts. And even if it did,

1 it is unlikely that his motion would have been timely: Mr. Luna-Garcia
2 was sentenced on March 24, 2006, ECF No. 98; the Judgment in a Criminal
3 Case, was entered on March 29, 2009, ECF No. 99; and his two appeals to
4 the Ninth Circuit were dismissed as untimely on March 12, 2009, ECF No.
5 108, and as duplicative of the first appeal on October 22, 2009, ECF No.
6 120. Thus, his February 22, 2011 motion would have been filed past §
7 2255's one-year statute of limitations. See 28 U.S.C. § 2255(f); Fed.
8 R. App. P. 4(b)(1)(A)(i); see *Clay v. United States*, 537 U.S. 522 (2003);
9 *United States v. Schwartz*, 274 F.3d 1220, 1223 (9th Cir. 2001) (finding
10 that the statute of limitations begins to run "upon the expiration of the
11 time during which [the petitioner] could have sought review by direct
12 appeal").

13 Accordingly, **IT IS HEREBY ORDERED:** Gerino Luna-Garcia's Post
14 Conviction Motion Pro Se Under Apprendi's Law to Dismiss with Supporting
15 Memorandum of Law, **ECF No. 122**, is **DENIED**.

16 **IT IS SO ORDERED.** The District Court Executive is directed to:

17 A. Enter this Order;

18 B. Provide a copy of this Order to Defendant/Petitioner Gerino
19 Luna-Garcia at the following address:

20 Gerino Luna-Garcia # 15591-085
21 F.C.I. - Dalby
22 805 North Avenue F
Post, TX 79356

23 **DATED** this 18th day of May 2011.

24 s/Edward F. Shea

25 EDWARD F. SHEA

26 United States District Judge

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